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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re) Case No. 10-44610-E-7
JAMES L. MACKLIN,)
Debtor(s).)
_____))
JAMES L. MACKLIN,) Adv. Pro. No. 11-2024
Plaintiff(s),) Docket Control No. RAB-4
v.)
DEUTSCHE BANK NATIONAL TRUST)
CO., AS INDENTURE TRUSTEE FOR)
THE ACCREDITED MORTGAGE LOAN)
TRUST 2006-2 ASSET-BACKED)
NOTES, et al.,)
Defendant(s).)
_____)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION

This Adversary Proceeding was commenced by James Macklin ("Macklin") on January 13, 2011. Deutsche Bank National Trust Company, as Indentured Trustee for the Accredited Mortgage Loan Trust 2006-2 Asset-Backed Notes ("DBNTC"), seeks to dismiss the First Amended Complaint in this Adversary Proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6) as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012.

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1 The court previously granted a motion filed by DBNTC to dismiss the
2 Original Complaint, with leave to amend granted to Macklin. On
3 June 17, 2011, Macklin filed his First Amended Complaint ("FAC"),
4 Dckt. 120) which is the subject of the present Motion to Dismiss.

5 **MACKLIN'S BANKRUPTCY CASE¹**

6 Macklin commenced a Chapter 13 case on September 16, 2010.²
7 On Schedule A, Macklin listed one real property asset, described
8 only as "Three Bedroom-Two Bath Single Family Residence." He
9 stated that the current value of this unidentified property was
10 "unknown" and the amount of the secured claim was \$0.00.³ On
11 Schedule D, Macklin lists DBNTC as having a disputed, unliquidated
12 claim in the amount of \$532,000.00, all of which was stated to be
13 unsecured. No value is given for the collateral and Macklin did
14 not identify the property which secures the claim or the value of
15 such property.⁴ Macklin filed the Chapter 13 case *in pro se*.

16 On September 30, 2011, Macklin filed an election to convert
17 his case to one under Chapter 7 and filed several Amended
18 Schedules, several Original Schedules, and his Statement of
19 Financial Affairs in the bankruptcy case. For the conversion and
20 pleadings filed from and after September 30, 2010, Macklin was
21

22 ¹ The court has included a detailed discussion of Macklin's
23 bankruptcy case as it relates to this Adversary Proceeding for the
24 benefit of his recently-retained substitute counsel. From reviewing
25 the pleadings filed by the new counsel, it appears that he may not be
26 familiar with the proceedings, statements made by Macklin, and the
27 fact that Macklin did not to comply with the orders for the requested
28 temporary restraining order and preliminary injunction in this case.

² Bankr. E.D. Cal. Case No. 10-44610 ("Bankruptcy Case").

³ Bankruptcy Case Dckt. 1, Schedule A.

⁴ *Id.*, Schedule D.

1 represented by counsel.⁵ These new pleadings include the following.

2 On Amended Schedule A, Macklin affirmatively states "none" as
3 to having any interest in real property, removing any reference to
4 the "Three Bedroom-Two Bath Single Family Residence" previously
5 listed. On Schedule B, Macklin lists no personal property claims
6 or causes of action of any kind (including any against DBNTC). No
7 exemption is claimed in any real property or any claims against
8 DBNTC on Amended Schedule C.

9 Three creditors are listed on Amended Schedule D and eight
10 creditors are listed on Schedule F; DBNTC is not among them.
11 Schedule I lists Macklin as having income of \$2,200.00 per month
12 (having been employed one month) and being divorced. Schedule J
13 filed by the Debtor lists monthly expenses of \$6,452.60 per month,
14 including a mortgage payment of \$2,230.00 per month,
15 notwithstanding no real property listed on Amended Schedule A or
16 real property secured claim listed on Amended Schedule D. *Id.*

17 In response to Question 1 of the Statement of Financial
18 Affairs, Macklin lists gross income of \$17,600.00 in 2010 year to
19 date (average of \$2,200.00 per month for January through August
20 2010), \$15,000.00 (average of \$1,250.00 per month) in 2009, and
21 \$25,000.00 (average of \$2,000.00 per month) in 2008.⁶ No other
22 income is stated on the Statement of Financial Affairs. In
23 response to Question 5, Macklin states that property known as
24 10040 Wise Road, Auburn, California, was foreclosed on by Select
25 Portfolio Servicing on December 14, 2009.

27 ⁵ Bankruptcy Case Dckt. 24.

28 ⁶ *Id.*

On November 17, 2010, Macklin again amended his Schedules.⁷ On the Second Amended Schedule A, Macklin listed an ownership interest of unstated nature in real property commonly know as 10040 Wise Road, Auburn, California (the "Property"), with a value of \$659,000.00 and subject to \$0.00 in secured claims. Amended Schedule B lists a new asset, the District Court action *Macklin v. Select Portfolio Servicing*, E.D. Cal. Case No. 2:10-cv-1097, for an unstated value.⁸ Second Amended Schedule C claims a homestead exemption in the Property and no exemption in the lawsuit or any claims relating to the lawsuit. Amended Schedule F lists Select Portfolio Servicing as having a disputed claim for \$0.00 based on a line of credit as "Alleged Creditor on 1st Mortgage." The Amended Statement of Financial Affairs lists the District Court lawsuit, identified as breach of "contract, fraud, foreclosure."

⁷ Bankruptcy Case Dckt. 56.

⁸ The District Court proceeding was commenced on May 3, 2010, when defendants Matthew Hollingworth, Robert J. Jackson, Amy E. Starrett, and R.K. Arnold removed the state-court action Macklin had filed against DBNTC and others in the California Superior Court for Placer County. As with the FAC before this court, the first amended complaint before the district court is drafted in a textually dense manner, argumentative, and includes points and authorities. The state-court complaint runs 127 pages in length. The District Court stayed that action based on Macklin having filed bankruptcy, believing that the bankruptcy filing stayed the District Court action as a matter of law. This was notwithstanding DBNTC correctly notifying the District Court that the automatic stay applies only as to actions against the debtor, not actions commenced by the debtor against others. This is true even if the non-bankruptcy proceeding may result in the dismissal of or entry of summary judgment against the debtor in an action commenced by the debtor. Unfortunately, it does not appear that the District Court was cited to authorities such as *Parker v. Bain et. al.*, 68 F.3d 1131 (9th Cir. 1995); *Alpern v. Lieb*, 11 F.3d 689 (7th Cir. 1993); *McMillan v. Mbank Forth Worth N.A.*, 4 F.3d 362 (5th Cir. 1993); *Brown v. Armstrong*, 942 F.2d 1007 (8th Cir. 1991); *Carley Capital Group v. Fireman's Fund Ins. Co.*, 889 F.2d 1126 (DC Cir. 1989); *In re Way*, 229 B.R. 11 (B.A.P. 9th Cir. 1998); *In re White*, 186 B.R. 700, (B.A.P. 9th Cir. 1995); and *In re Merrick*, 175 B.R. 333 (B.A.P. 9th Cir. 1994).

Though not having stated an exemption for any of the rights or causes of action in the District Court action (or otherwise scheduled whatever rights or causes of action he asserted against DBNTC), Macklin commenced the present Adversary Proceeding on January 13, 2011. The Chapter 7 Trustee was not a party to this action, nor were the rights or causes of action (property of the bankruptcy estate) abandoned or transferred by the Chapter 7 Trustee to Macklin.

FACTS AS ALLEGED IN THIS ADVERSARY PROCEEDING

Macklin refinanced his home in April 2006 and executed a Note naming Accredited Home Lenders, Inc. as the payee and a Deed of Trust against the Property to secure the Note. It is alleged that subsequently the Note was transferred to unidentified parties and then eventually transferred to DBNTC. Several documents relating to changing the trustee under the Deed of Trust were recorded, with the beneficial interest in the deed of trust ultimately appearing in the records as transferred to DBNTC. The transfers are summarized as follows:

<u>Document</u>	<u>Grantor</u>	<u>Grantee/ New Trustee</u>	<u>Executed Date</u>	<u>Recorded Date</u>
Substitution of Trustee	MERS, Inc., as nominee for Accredited Home Lenders Inc.	Windsor Management Co.	Jan. 30, 2008 (Notarized Mar. 4, 2009)	Mar. 10, 2009
Substitution of Trustee	DBNTC	Quality Loan Service Corporation	Aug. 21, 2009	Nov. 25, 2009
Corporate Assignment of Deed of Trust	MERS, Inc., as nominee for Accredited Home Lenders Inc.	DBNTC	Nov. 17, 2009	Nov. 30, 2009

1 Macklin stopped making payments on the loan in 2008. DBNTC
2 commenced nonjudicial foreclosure proceedings and eventually
3 obtained a trustee's deed for the Property at a nonjudicial
4 foreclosure sale held on December 14, 2009, and then recorded the
5 trustee's deed. In January 2010, DBNTC posted a notice to vacate
6 and later commenced an unlawful detainer action in the California
7 Superior Court.

8 Macklin filed for bankruptcy protection pursuant to Chapter 13
9 of the Bankruptcy Code on September 16, 2010. The bankruptcy case
10 was subsequently converted to a proceeding under Chapter 7. DBNTC
11 sought relief from the automatic stay provided by 11 U.S.C.
12 § 362(a). After two hearings and permitting Macklin to offer
13 supplemental arguments and evidence in opposition, the court
14 granted relief from the automatic stay by an order entered on
15 February 4, 2011.⁹ The 14-day stay of enforcement provided by
16 Federal Rule of Bankruptcy Procedure 4001(a)(3) expired on Friday,
17 February 18, 2011.

18 19 PROSECUTION OF ADVERSARY PROCEEDING

20 Macklin filed this adversary proceeding on January 13, 2011.
21 The initial complaint sought (1) to determine the nature, extent,
22 and validity of any lien held by DBNTC, (2) to determine that the
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24 ⁹ Bankruptcy Case, Dckt. 100. The Chapter 7 Trustee did not
25 file any opposition to the motion for relief from the automatic stay.
26 As a Chapter 7 debtor, Macklin was not attempting any reorganization,
27 as of February 2011, no interests in the lawsuit was asserted by or
28 for the estate. In terminating the stay, the court noted that Macklin
could seek injunctive relief in the Adversary Proceeding for his
rights, and if the Trustee determined that there were undisclosed
rights of the Estate, he could seek relief from the order granting
relief from the stay as to the estate. Bankruptcy Case Dckt. 99.

1 underlying note has been satisfied or converted to unsecured debt,
2 (3) damages for DBNTC's purported violation of the Truth-in-Lending
3 Act by failing to notify Macklin that it obtained an interest in
4 the mortgage loan, (4) a declaration that the assignments of the
5 trust deeds were a fraudulent conveyance, (5) damages for libel,
6 and (6) to quiet title to the Property. Macklin prays for
7 \$1 million in general damages, \$750,000.00 special damages,
8 punitive damages, attorneys' fees and costs, an order quieting
9 title in the property in his favor, and other just relief. On
10 April 7, 2011, DBNTC filed a Motion to Dismiss.¹⁰ The court granted
11 the Motion to Dismiss by order entered on May 20, 2011, with leave
12 to amend.¹¹ Macklin then filed the FAC on June 17, 2011.¹² The FAC
13 asserts ten causes of action: (1) Violations of the Truth-in-
14 Lending Act; (2) Violations of the Real Estate Settlement
15 Procedures Act; (3) Violation of the Fair Credit Report Act;
16 (4) Fraud; (5) Unjust Enrichment; (6) Violation of Racketeer
17 Influenced and Corrupt Organizations Act; (7) Violation of
18 California Business & Professions Code § 17200; (8) Breach of Trust
19 Instrument; (9) Wrongful Foreclosure; and (10) Quiet Title.

20 Based on the Original Complaint Macklin sought a temporary
21 restraining order preventing DBNTC from taking possession of the
22 Property based on an asserted trustee's deed obtained through a
23 nonjudicial foreclosure sale.¹³ The court issued a ruling granting
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25 ¹⁰ Dckt. 71.

26 ¹¹ Dckt. 97.

27 ¹² Dckt. 120.

28 ¹³ Dckt. 6, filed February 7, 2011.

1 the Motion, conditioning the issuance of the temporary restraining
2 order on Macklin posting a \$5,000.00 bond.¹⁴ The \$5,000.00 bond was
3 never posted and the temporary restraining order was not issued by
4 the court.

5 Macklin also sought issuance of a preliminary injunction.¹⁵
6 The court granted the motion for a preliminary injunction on
7 May 19, 2011.¹⁶ On May 20, 2011, the court entered an order
8 enjoining DBNTC from "exercising any powers, rights, or interests
9 under or relating to any Deed of Trust, mortgage, lien or other
10 security interest against or relating to the 'Wise Road Property.'"
11 In its ruling on the Motion for Preliminary Injunction, the court
12 found that because DBNTC did not properly follow the procedures for
13 substituting the trustee under the Deed of Trust and noticing the
14 sale, there was a likelihood of Macklin prevailing on the issue of
15 whether the power of sale under the deed of trust had been properly
16 exercised.

17 Though Macklin had failed to fund the \$5,000.00 bond, the
18 court issued the preliminary injunction, allowing Macklin to fund
19 a cash bond with payments of \$1,500.00 a month, with the first
20 payment due on May 31, 2011. Because Macklin was not making either
21 a mortgage or rent payment, the \$1,500.00 a month payment was
22 reasonable and an appropriate accommodation for a debtor who was in
23 the midst of a Chapter 7 case to fund a cash bond rather than
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26 ¹⁴ Dckt. 66.

27 ¹⁵ Dckt. 26.

28 ¹⁶ Dckt. 100.

1 requiring a traditional third-party bond.¹⁷ On August 10, 2011,
2 DBNTC filed a motion for the court to vacate the preliminary
3 injunction based on Macklin's failure to fund the \$1,500.00 monthly
4 cash bond.¹⁸ In opposing the motion, Macklin did not dispute his
5 failure to fund the cash bond, but boldly requested that the
6 preliminary injunction be modified to allow Macklin to begin paying
7 \$750.00 a month to the Chapter 7 Trustee as rent for the use of the
8 Property.¹⁹ Macklin unilaterally chose to ignore this court's order
9 for the bond required by the court pursuant to Federal Rule of
10 Civil Procedure 65 and Federal Rule of Bankruptcy Procedure 7065.
11 The court rejected Macklin's modification of the court's order for
12 a Rule 65(c) bond, finding that Macklin had failed to comply with
13 the requirements for the preliminary injunction and rejecting his
14 proposal to pay the Chapter 7 Trustee a significantly lower amount
15 rather than funding the bond.²⁰ The preliminary injunction was
16 vacated, effective September 28, 2011.²¹

17 On May 12, Macklin moved the court for an order compelling the
18 Trustee to abandon the Property.²² The Trustee opposed the Motion
19 to Abandon, arguing that the Property was valuable to the Estate.²³
20 Based on the Trustee's opposition, the Court denied Macklin's
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22 ¹⁷ Memo. Opinion & Decision, Dckt. 98.

23 ¹⁸ Dckt. 158.

24 ¹⁹ Dckt. 170.

25 ²⁰ Dckt. 186.

26 ²¹ Dckt. 187.

27 ²² Bankruptcy Case Dckt. 103.

28 ²³ Bankruptcy Case Dckt. 116.

1 Motion without prejudice by order entered on July 5, 2011.²⁴

2 On July 14, 2011, the Trustee filed a motion to intervene in
3 the Adversary Proceeding.²⁵ In doing so, the Trustee argued that
4 he was vested with the exclusive power to prosecute causes of
5 action belonging to the estate. The court granted the Trustee's
6 Motion to Intervene without prejudice to DBNTC's right to seek
7 dismissal of the case based on Macklin's lack of standing by order
8 entered on August 2, 2011.²⁶

9 On August 19, 2011, eight months after the Adversary
10 Proceeding was filed, the Chapter 7 Trustee filed a motion to sell
11 all of the Estate's causes of action against DBNTC to Macklin.²⁷
12 The purchase price paid by Macklin for these claims was the first
13 \$150,000.00 in net proceeds recovered from DBNTC. Notwithstanding
14 the opposition of DBNTC, the court approved the sale.²⁸

15 ANALYSIS

16 In considering a motion to dismiss, the court starts with the
17 basic premise that the law favors disputes being decided on their
18 merits, and a complaint should not be dismissed unless it appears
19 beyond doubt that the plaintiff can prove no set of facts in

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21 ²⁴ Bankruptcy Case Dckt. 120.

22 ²⁵ Dckt. 135.

23 ²⁶ Dckt. 149.

24 ²⁷ Bankruptcy Case Dckt. 124.

25 ²⁸ Though the court approved the sale on September 15, 2011, and
26 the civil minutes state that Counsel for the Trustee was to submit a
27 proposed order to the court, no order has been submitted or entered
28 approving the sale. An additional condition to the sale as approved
by the court is that any settlement or proposed transfer of any rights
of the Estate in the Property be first approved by the court pursuant
to a motion to compromise filed by the Chapter 7 Trustee. Bankruptcy
Case Dckt. 136.

1 support of his claim which would entitle him to the relief.²⁹ Any
2 doubt with respect to whether a motion to dismiss is to be granted
3 should be resolved in favor of the pleader.³⁰ For purposes of
4 determining the propriety of a dismissal before trial, allegations
5 in the complaint are taken as true.³¹

6 The complaint must provide more than labels and conclusions,
7 or a formulaic recitation of a cause of action; it must plead
8 factual allegations sufficient to raise more than a speculative
9 right to relief.³² Federal Rule of Civil Procedure 8, made
10 applicable to this adversary proceeding by Federal Rule of
11 Bankruptcy Procedure 7008, requires that complaints contain a
12 short, plain statement of the claim showing entitlement to relief
13 and a demand for the relief requested.³³ The pleading standard
14 under Rule 8 does not require "detailed factual allegations," but
15 it does demand more than an unadorned accusation or conclusion of
16 a cause of action.³⁴ As the court held in *Ashcroft v. Iqbal*,³⁵

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18 ²⁹ *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976).

19 ³⁰ *Pond v. General Electric Company*, 256 F.2d 824, 826-827 (9th
20 Cir. 1958).

21 ³¹ *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

22 ³² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

23 ³³ Fed. R. Civ. P. 8(a).

24 ³⁴ *Bell Atlantic*, 550 U.S. at 555.

25 ³⁵ To survive a motion to dismiss, a complaint must contain
26 sufficient factual matter, accepted as true, to state a claim to
27 relief that is plausible on its face. A claim has facial plausibility
28 when the plaintiff pleads factual content that allows the court to
draw the reasonable inference that the defendant is liable for the
misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937,
1949, 173 L. Ed. 2d 868, 884 (2009) (citations and quotation marks
omitted).

1 Rule 8 also requires that allegations be "simple, concise, and
2 direct."³⁶

3 In ruling on a Rule 12(b)(6) motion to dismiss, the Court may
4 consider "allegations contained in the pleadings, exhibits attached
5 to the complaint, and matters properly subject to judicial
6 notice."³⁷ The court need not accept unreasonable inferences or
7 conclusory deductions of fact cast in the form of factual
8 allegations.³⁸ Nor is the court required to "accept legal
9 conclusions cast in the form of factual allegations if those
10 conclusions cannot be reasonably drawn from the facts alleged."³⁹

11 DBNTC asserts in the Motion to Dismiss the First Amended
12 Complaint that:

- 13 (1) Macklin lacks standing to continue this action because
14 the Chapter 7 Trustee has not abandoned the action to
15 Macklin; the Trustee's intervention does not cure
16 standing defects;
- 17 (2) Macklin's Truth-in-Lending Act ("TILA") cause of action
18 is barred by the one-year statute of limitations
19 (15 U.S.C. § 1640(e));
- 20 (3) Macklin's Real Estate Settlement Procedures ("RESPA")
21 cause of action is time-barred by the three-year statute
22 of limitations (12 U.S.C. §§ 2605, 2607);
- 23 (4) Macklin's Fair Credit Reporting Act ("FCRA") cause of
24 action fails because Macklin has not alleged two critical
25 components of a private action under FCRA: (1) That DBNTC
26 is subject to the FCRA; and (2) That information
27 allegedly reported was inaccurate;

24 ³⁶ Fed. R. Civ. P. 8(d)(1).

25 ³⁷ *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

26 ³⁸ *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
27 2001).

28 ³⁹ *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55
(9th Cir. 1994)

- (5) The complaint fails to plead with particularity DBNTC's involvement in any fraudulent conveyance;
- (6) Macklin does not to state a claim for unjust enrichment because Macklin received the benefit of the bargain;
- (7) Macklin does not to state a valid Violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") pursuant to 18 U.S.C. §§ 1961-68 because he has not alleged plausible predicate acts with the requisite particularity (pursuant to Federal Rules of Civil Procedure 9(b)) to state a cause of action;
- (8) Macklin does not state a claim for violation of California Business & Professions Code § 17200 because he failed to allege that Defendant engaged in unlawful, unfair or fraudulent business acts or practices;
- (9) Macklin does not state a claim for wrongful disclosure because although the corporate assignment was executed after the Substitution of Trustee and Notice of Trustee Sale were executed, it was executed before either document was recorded; and
- (10) The complaint does not allege the required elements for a quiet title action.

STANDING

DBNTC challenges Macklin's standing to maintain this adversary proceeding. Once the case was converted, the Chapter 7 Trustee came into possession of all rights and property of the Estate.⁴⁰ Property of the estate includes any legal or equitable interest belonging to the debtor as of the filing of the bankruptcy petition.⁴¹ Pursuant to 11 U.S.C. §§ 323(a) and 704, the trustee, as the representative of the estate, has the exclusive capacity to sue and be sued on behalf of the estate. Once appointed, the Chapter 7 Trustee had the sole authority to prosecute the action unless that action has been abandoned to the debtor or the debtor

⁴⁰ 11 U.S.C. § 323(a) (Trustee is the representative of the Estate).

⁴¹ 11 U.S.C. § 541.

1 hold a pecuniary interest in the surplus estate.⁴²

2 Here, Macklin's bankruptcy case was commenced on September 16,
3 2010, as one under Chapter 13 of the Bankruptcy Code which was
4 subsequently converted to Chapter 7 by order entered on October 6,
5 2010. The Chapter 7 Trustee filed his report of no distribution on
6 December 23, 2010, indicating that there was no property available
7 for distribution.⁴³ Macklin was granted his discharge on
8 February 7, 2011.⁴⁴

9 Property that is scheduled and not otherwise administered at
10 the closing of the case is abandoned to the debtor unless the court
11 orders otherwise.⁴⁵ In his bankruptcy case, Macklin eventually
12 disclosed a lawsuit then pending before the District Court styled
13 *Macklin v. Select Portfolio Servicing*, and DBNTC's claim (under
14 Select Portfolio Servicing's name as unsecured) in amended
15 Schedules filed November 17, 2010. A review of the docket in the
16 bankruptcy case shows that the bankruptcy case has not been closed.
17 Therefore, the asset relating to that lawsuit had not been
18 abandoned to Macklin at the time this Adversary Proceeding was
19 commenced.

20 The Chapter 7 Trustee and Macklin achieved an agreement by
21 which all rights in this action, both the exempt and nonexempt
22 interests which are in the bankruptcy estate, were to be sold to

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24 ⁴² *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 n.2 (9th
25 Cir. 1994); *Donovan & Schuenke v. Sampsell*, 226 F.2d 804, 809-10 (9th
Cir. 1955); *Stoll v. Quintanar (In re Stoll)*, 252 B.R. 492, 495
(B.A.P. 9th Cir. 2000).

26 ⁴³ Bankruptcy Case Dckt. 71.

27 ⁴⁴ Bankruptcy Case Dckt. 101.

28 ⁴⁵ 11 U.S.C. § 554(c).

1 and litigated by Macklin. DBNTC's assertion of the general
2 statement in *Houston v. Eiler (In re Cohen)*⁴⁶ that intervention by
3 one with standing does not retroactively cure a jurisdictional
4 standing defect is not determinative of the issue in this Adversary
5 Proceeding. First, Movant neglects to address that the decision in
6 *Houston* related to a situation where the judgment had already been
7 entered in the adversary proceeding. The authority for the holding
8 in *Houston* is cited as *United States ex rel. Texas Portland Cement*
9 *Co. v. McCord*,⁴⁷ which addressed a statute by which Congress
10 expressly granted the United States, and only the United States,
11 the exclusive right to bring the action in that case. The
12 intervention in that case did not cure the fact that no right to
13 bring the action under the statute existed (no cause of action
14 could be brought by creditors until six months after the completion
15 of the contract if the United State had not brought suit). Since
16 no cause of action existed, it did not matter who attempted to
17 bring the suit.

18 In *Benavidez v. Eu*,⁴⁸ cited by Movant, the Ninth Circuit Court
19 of Appeals addresses this issue in the context of whether the
20 federal court had original subject matter jurisdiction. Footnote 4
21 in *Benavidez* includes a discussion of cases for the proposition
22 that (1) intervention is not proper when no federal cause of action
23 (subject matter jurisdiction) existed, (2) invention was proper
24 where intervening party could establish subject matter
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26 ⁴⁶ 305 B.R. 886, 892 (B.A.P. 9th Cir. 2004)

27 ⁴⁷ 233 U.S. 157, 163-64, 58 L. Ed. 893, 34 S. Ct. 550 (1914)

28 ⁴⁸ 34 F.3d 825 (9th Cir. 1994)

1 jurisdiction, and (3) intervention was improper where intervenors
2 were indispensable parties and joinder would destroy diversity
3 subject matter jurisdiction.

4 Under the principles addressed by the Ninth Circuit Court of
5 Appeals in *Dunmore v. United States*,⁴⁹ the filing of this complaint
6 by the Debtor during the pendency of this Chapter 7 case may be
7 cured as provided in Federal Rules of Civil Procedure 17(a). The
8 issue turns on whether the filing of this Complaint by Macklin was
9 an "understandable mistake" and not a strategic decision. On
10 December 23, 2010, the Chapter 7 Trustee filed his Report of No
11 Distribution. The Debtor listed the real property which is the
12 subject of this Adversary Proceeding on Amended Schedule A and
13 claimed it exempt on Schedule C filed on November 17, 2011.⁵⁰ It
14 is reasonable for Macklin to conclude that the Report of No
15 Distribution meant what it said, the Chapter 7 trustee did not
16 intend to prosecute any claims or take any action which would
17 protect Macklin's exemption in the Property.

18 Facing a hearing on a motion for relief from the automatic
19 stay, Macklin commenced this adversary proceeding asserting
20 interests and rights in the Property which the Chapter 7 Trustee
21 was not asserting. While not correct, the court believes that it
22 is an "understandable mistake" for Macklin to believe that he could
23 and should commence the action to protect his interests in the
24 Property.⁵¹ There is nothing to indicate that the filing was a

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26 ⁴⁹ 358 F.3d 1107 (9th Cir. 2004)

27 ⁵⁰ Bankruptcy Case Dckt. 56.

28 ⁵¹ In *Dunbar*, the Ninth Circuit Court of Appeals remanded to the
district court to expressly address this issue of "understandable

1 strategic decision or gamesmanship undertaken by Macklin. The
2 principles underlying Federal Rules of Civil Procedure 17(a) are to
3 prevent prejudice to the initial plaintiff (such as claims being
4 time barred) and preventing the wasting of limited judicial time
5 and resources though multiple filings of the same proceeding.

6 The Motion to dismiss on the grounds that Macklin did not have
7 and does not have standing to prosecute the adversary proceeding is
8 denied.

9 **TRUTH-IN-LENDING ACT ("TILA") - FIRST CAUSE OF ACTION**

10 Macklin asserts a claim (First Cause of Action) based on
11 "Defendant and/or its agents[']" failure to disclose,

12 [c]ertain finance charges shown on the TILA statement and
13 certain information, such as the identify of the
14 creditor; each amount that is or will be paid to third
15 persons by the creditor on the consumer's behalf,
16 together with an identification or or reference to the
17 third person; that the loan exceeded the fair market
18 value of the Subject Property, with a clear and
conspicuous statement that -(A) the interest on the
portion of the credit extension that is greater than the
fair market value fo the dwelling is not tax deductible
for Federal income tax purposes; and (B) the consumer
should consult a tax adviser for further information
regarding the deductibility of interest and charges.⁵²

19 Macklin further alleges that (1) "Defendant and/or its agents"
20 falsified his loan application; and (2) "Defendant and/or its
21 agents" did not respond to his alleged Notice of Rescission.
22 Finally, Macklin alleges he did not receive the proper disclosure
23 of the finance charges that were incident to his refinancing the
24 Property on April 19, 2011.

25 _____
26 mistake" and whether intervention pursuant to Federal Rules of Civil
27 Procedure 17(a) cured any defect in having the proper party plaintiff
before the court.

28 ⁵² FAC ¶ 52.

1 Pursuant to 15 U.S.C. § 1631, the creditor is required to
2 disclose to the person obligated on a consumer credit transaction
3 "the sum of all charges, payable directly or indirectly by the
4 person to whom the credit is extended, and imposed directly or
5 indirectly by the creditor as an incident to the extension of
6 credit." Here, however, Macklin admits that DBNTC was not the
7 creditor in the original transaction that allegedly triggered the
8 statutory disclosure requirements. According to Macklin's FAC, the
9 creditor was either Accredited Home Lenders, Inc. or Centennial
10 Bank of Colorado.⁵³ Therefore, the court finds that Macklin has not
11 stated a claim against DBNTC, who was not an original party to the
12 original underlying loan transaction.

13 Macklin further asserts that "Defendants and/or its agents"
14 did not respond to his attempt to rescind his loan pursuant to
15 15 U.S.C. § 1635. Section 1635(a) of TILA, the "buyer's remorse"
16 provision, gives borrowers three business days to rescind a loan
17 agreement without penalty. If the lender does not disclose
18 important terms of the loan accurately, 15 U.S.C. § 1635(f) gives
19 the borrower the right to rescind until "three years after the date
20 of consummation of the transaction or upon the sale of the
21 property, whichever occurs first."⁵⁴ In Macklin's letter to the
22 loan servicer, however, he demanded to be repaid all of his
23 payments on the loan (\$125,713.46), have the promissory note
24 returned by him, and retain the Property free and clear of any
25

27 ⁵³ FAC ¶ 55, Lines 12-14.

28 ⁵⁴ *King v. California*, 784 F.2d 910, 913 (9th Cir. 1986).

1 liens.⁵⁵ This not a rescission, but a demand by Macklin to be paid
2 money, have his note returned to him, and be given property free
3 and clear of the deed of trust.⁵⁶

4 Accordingly, based on the foregoing, the Motion to Dismiss is
5 granted as to the First Cause of Action without leave to amend.

6 **Additional Statute of Limitations Grounds**

7 DBNTC further argues that this claim is bared by TILA's one-
8 year statute of limitations.⁵⁷ Macklin replies that any statute of
9 limitation was equitably tolled.

10 The Ninth Circuit applies equitable tolling to TILA's one-year
11 statue of limitations.⁵⁸ Equitable tolling is applied to effectuate
12 the congressional purpose of TILA.⁵⁹ "[C]ourts have construed TILA
13 as a remedial statute, interpreting it liberally for the
14 consumer."⁶⁰ Specifically, the Ninth Circuit held:⁶¹

15 [T]he limitations period in Section 1640(e) runs from the
16 date of consummation of the transaction but that the
17 doctrine of equitable tolling may, in the appropriate
18 circumstances, suspend the limitations period until the
19 borrower discovers or had reasonable opportunity to
20 discover the fraud or nondisclosures that form the basis
21 of the TILA action.

22 Where, here, the borrower alleges that the required disclosure was

23 ⁵⁵ Exhibit 15 to FAC.

24 ⁵⁶ Once the note is returned and there is no enforceable
25 obligation, there is nothing for the deed of trust to secure.

26 ⁵⁷ See 15 U.S.C. § 1640(e).

27 ⁵⁸ *King v. California*, 784 F.2d 910, 914 (9th Cir. 1986).

28 ⁵⁹ *Id.* at 914-15.

⁶⁰ *Id.* (citing *Riggs v. Gov't Emps. Fin. Corp.*, 623 F.2d 68,
70-71 (9th Cir. 1980)).

⁶¹ *Id.* (emphasis added).

1 not provided, it is proper to toll the statute of limitations until
2 the borrower discovered or had a reasonable opportunity to discover
3 the nondisclosure. This does not mean that the statute of
4 limitations is tolled until the borrower decides he or she wants to
5 file litigation.

6 However there is a more foundational issue that must be
7 addressed. Section 1641(g) applies to "a mortgage loan . . . sold
8 or otherwise transferred or assigned to a third party." Section
9 1641(g) was added by an Act of Congress dated May 20, 2009, and
10 therefore may not apply to the mortgage loan transaction at issue
11 here – the transfer of the promissory note into the Trust, not the
12 assignment of the deed of trust or the substitution of trustee.
13 Macklin's complaint alleges that this occurred simultaneously with
14 the transfer in the beneficial interest in the deed of trust in
15 November 2009. However, this factual assertion is based solely
16 upon the assignment of the trust deed, not a review of the
17 underlying note.

18 Therefore, to the extent the mortgage loan transaction
19 occurred after enactment of Section 1641(g), the one-year statute
20 of limitations was tolled until Macklin discovered or had a
21 reasonable opportunity to discover the nondisclosure. However, if
22 the transaction occurred before May 20, 2009, the cause of action
23 fails as the obligation to provide the notice did not yet exist.

24 The FAC alleges that the transfer occurred on November 30,
25 2009. Therefore, the notice required by Section 1641(g), if
26 required at all, was due on December 30, 2009. Macklin's cause of
27 action therefore accrued on December 31, 2009. Normally the
28 statute of limitations would require the cause of action based on

1 this TILA violation to be brought no later than December 31, 2010.
2 This complaint was not filed, however, until January 13, 2011,
3 13 days later.

4 Construing the facts pled in the complaint in the light most
5 favorable to Macklin, for purposes of the present Motion the court
6 concludes that at this juncture the mortgage loan transaction
7 occurred after the effective date of Section 1641(g). However,
8 prior to March 31, 2009 (the date of the response to the Notice of
9 Rescission), Macklin sent a Notice of Rescission which asserts
10 extensive TILA violations, rights arising under the California
11 Commercial Code, and Fair Debt Collection Practices Act violations.
12 Though this Notice of Rescission is undated, it had to predate the
13 March 31, 2009 response and demonstrates that as early as March
14 2009 Macklin was aware of potential TILA and other claims arising
15 out of the loan.⁶² Therefore, the motion to dismiss the TILA claim
16 (First Cause of Action) as untimely due to the Statute of
17 Limitations is also granted, without leave to amend.

18
19 **REAL ESTATE SETTLEMENT PROCEDURES**
ACT ("RESPA") - SECOND CAUSE OF ACTION

20 Macklin's Second Cause of Action alleges Defendant violated
21 12 U.S.C. §§ 2605 and 2607. Macklin alleges that "Defendant and/or
22 its agents" accepted fees for real estate services which were
23 actually used to purchase securities and the attendant fees
24 provided for in the Master Sales and Servicing Agreement. Macklin
25 further alleges that the "Servicer" breached 12 U.S.C. § 2605 by
26

27 ⁶² Exhibits 15 and 16, which include USPS certified mail receipts
28 showing delivery on Roup & Associates and Windsor Management (the
persons to whom the Notice of Rescission was addressed) on
February 12, 2009. Dckt. 125.

1 not adequately responding to a "qualified written request" pursuant
2 to 11 U.S.C. § 2605(e).⁶³

3 DBNTC alleges that the RESPA claims are time-barred. An
4 action alleging violation of 12 U.S.C. § 2605 must be brought
5 within three years of such violation, and an action alleging
6 violation of 12 U.S.C. § 2607 must be brought within one year of
7 such a violation.⁶⁴ The loan transaction at issue here closed in
8 April 2006. Macklin did not file this action until January 13,
9 2011, almost five years later. Accordingly, the court finds that
10 the cause of action under RESPA is time-barred.

11 DBNTC further asserts that RESPA requires the disclosures
12 complained of here to be made by a "servicer" of any federally
13 related mortgage loan.⁶⁵ "Section 2605 of RESPA requires a loan
14 servicer to provide disclosure relating to the assignment, sale, or
15 transfer of loan servicing to a potential or actual borrower:
16 (1) at the time of the loan application, and (2) at the time of
17 transfer."⁶⁶ Likewise, "[t]he loan servicer also has a duty to
18 respond to a borrowers's inquiry or 'qualified written request.'"⁶⁷
19 Defendant DBNTC alleges without dispute that it is not a loan
20 servicer. Macklin does not allege that DBNTC is a "servicer,"

21
22 ⁶³ Imposing on the servicer a duty to provide a written response
23 acknowledging receipt of the correspondence within 20 days and a duty
to conduct an investigation to provide the borrower with a written
explanation or clarification.

24 ⁶⁴ See *Lee v. Aurora Loan Servs.*, No. _____, 2010 U.S. Dist.
25 LEXIS 56094, *14-15 (N.D. Cal. May 18, 2010).

26 ⁶⁵ See 12 U.S.C. § 2601 et seq.

27 ⁶⁶ *McGill v. Wachovia Mortg., FSB Loan*, 2010 U.S. Dist. LEXIS
43393, *20 (E.D. Cal. Mar. 3, 2010).

28 ⁶⁷ *Id.* at *20 (citing 12 U.S.C. § 2605(e)).

1 instead he makes general, nonspecific allegations that "Defendant
2 and/or its agents" were a servicer. The FAC goes further to allege
3 that Qualified Written Responses and inquiries were made of others,
4 and attempts to bring in the current Defendant, DBNTC, based upon
5 Macklin's interaction with others or predecessor owners of the
6 Note. Accordingly, Macklin fails to state a claim upon which
7 relief can be granted.

8 Based upon the foregoing, the Second Cause of Action is
9 dismissed without leave to amend.

10 **FAIR CREDIT REPORTING ACT ("FCRA") - THIRD CAUSE OF ACTION**

11 Macklin's Third Cause of Action alleges "Defendants" and
12 "Defendant and/or its agents" falsely reported that his loan
13 payments were in default when the loan payments were actually
14 current and were paid by the servicer, in violation of the FCRA.

15 The FCRA contains two provisions, 15 U.S.C. § 1681n and 1681o,
16 establishing a private right of action on behalf of consumers
17 against violators of the Act. Here, DBNTC asserts that Macklin has
18 not alleged the critical components of the FCRA: (1) that DBNTC is
19 subject to the FCRA; and (2) that the information allegedly
20 reported was inaccurate.

21 DBNTC's argument misses the point because Macklin does not
22 allege that DBNTC is a consumer reporting agency⁶⁸ or that it issues
23 consumer reports.⁶⁹ Rather, it states that DBNTC provided

24
25 ⁶⁸ 15 U.S.C. § 1681a(f) defines a consumer reporting agency to be
26 any person, for monetary fees, dues, or a cooperative nonprofit basis
engages in assembling or evaluating consumer credit information for
the purpose of providing consumer reports to third parties.

27 ⁶⁹ 15 U.S.C. § 1681a(d) defines a consumer report to be a
28 communication of information by a consumer reporting agency bearing on
a consumer's credit worthiness, credit standing, capacity, character,

1 information to Consumer Reporting Agencies – i.e. a furnisher⁷⁰ of
2 information subject to the FCRA. The FAC asserts that “defendant
3 and/or its agent wrongfully, improperly, and illegally reported
4 negative information as to Plaintiff, by falsely reporting the
5 mortgage loan payments were in default”⁷¹ This paragraph
6 of the FAC goes further to allege that the amount reported includes
7 excessive (unstated) amounts that the “plaintiffs” (though
8 referenced as multiple plaintiffs, there is only one plaintiff in
9 this Adversary Proceeding) were tricked into signing and that
10 “plaintiffs” made each and every payment on time from the closing
11 of the loan *until “plaintiffs’ default.”*⁷² Further, it is alleged
12 that “plaintiff’s” loan is current because the payments are being
13 made by the loan servicer.⁷³

14 Pleading the grounds in a complaint is more than merely
15 reciting the statutory grounds. In reading the FAC, Macklin admits
16 that the payments went into default.⁷⁴ He then states that the loan
17 is “current” as payments are being made by the servicer. However,
18 there is not an allegation that the servicer or any other person is
19 making the payments due on the Note for Macklin. It is alleged in
20 Paragraph 44 of the FAC that the servicer is obligated to make

21
22 general reputation, personal characteristics, or mode of living, to be
used in whole or in part for specific uses, including consumer credit.

23 ⁷⁰ 15 U.S.C. § 1681s-2 prohibits a person from furnishing
24 information to a consumer reporting agency if that person knows or has
reason to believe that the information is inaccurate.

25 ⁷¹ FAC ¶ 75.

26 ⁷² Emphasis added.

27 ⁷³ FAC ¶ 76.

28 ⁷⁴ FAC ¶ 75.

1 "advance" payments for nonperforming loans when the borrower
2 defaults. The statement is then made that the monies advanced are
3 not the servicer's "own money" and that "there is no provision in
4 the [mortgage backed securities] on what is to "occur when the
5 homeowner 's' [sic]." Further, Macklin alleges that, "The only
6 provision for 'default' under the [mortgage backed securities] is
7 the default of the Servicer."

8 While not clear from the FAC, the court understands the
9 argument to be that servicer was obligated on a contract, to which
10 Macklin is not a party, that if Macklin (or obligors on other
11 notes) defaulted in his payments, the servicer would advance monies
12 to the then current note holders while the default under the note
13 was enforced. Additionally, once the Note on which Macklin was
14 obligated was combined with other notes as part of a mortgage back
15 securities transaction, then there could no longer be a default on
16 the Macklin Note (and therefore the corollary argument that Macklin
17 had no further obligation to repay the obligation). Thus, Macklin
18 argues that even though he has defaulted on his obligation and
19 there have been defaults, the "servicer" making advances on an
20 unrelated contract constitutes a payment for the benefit of Macklin
21 and reduces his obligation on the Note. Though argued, Macklin
22 does not allege the legal or contractual basis for his being the
23 beneficiary of any third-party contract.

24 What Macklin also fails to allege is that DBNTC knew or had
25 reasonable cause to believe that Macklin's defaults under the Note
26 were false. Just as Macklin alleges, the payments were in default.
27 Merely because there is a disagreement as to an amount due, that
28 does not automatically create a FCRA violation. The FCRA

1 establishes a clear process by which disputes concerning furnished
2 information are addressed.⁷⁵ There is no indication that the
3 process has been employed with respect to this matter.

4 The Motion is properly granted to dismiss, without leave to
5 amend, the claim for violation of the FCRA.

6 **Additional Statute of Limitations Grounds**

7 Further, DBNTC alleges that the FCRA claims are time-barred.
8 According to 15 U.S.C. 1681p, "[A]n action to enforce any liability
9 created under this title . . . may be brought . . . not later than
10 the earlier of – (1) [two] years after the date of discovery by the
11 plaintiff of the violation that is the basis for such liability; or
12 (2) [five] years after the date on which the violation that is the
13 basis for such liability occurs." Macklin admits that he first
14 received a notice of default in December 2008, and did not commence
15 the instant adversary proceeding until January 13, 2011, a month
16 after the statute of limitations expired. No sufficient basis for
17 tolling the statute of limitations as to a claim arising under the
18 FCRA has been alleged or argued. Merely because Macklin chose to
19 ignore information furnished by DBNTC to a consumer reporting
20 agency until he decided to file a lawsuit alleging various claims
21 is not sufficient.

22 Based upon the foregoing, the Third Cause of Action is
23 dismissed without leave to amend.

24 **FRAUD - FOURTH CAUSE OF ACTION**

25 Macklin also alleges in his Fourth Cause of Action that DBNTC
26 defrauded him by assigning the deed of trust to itself without
27

28 ⁷⁵ 15 U.S.C. § 1681s-2(a)(2), (6), (8), and (b).

1 having authority to do so. Macklin asserts that he was not told
2 that part of his loan payments would be used to pay service fees to
3 the servicer and to buy insurance and other credit enhancements to
4 be used by the servicer. Macklin asserts that "Defendants" were
5 fiduciaries, and they breached their duty of care to Macklin by
6 fraudulently inducing Macklin to enter into a mortgage transaction
7 which was contrary to Macklin's intent and to his best interest.
8 However, Macklin does not allege that any fees paid by him were for
9 amounts other than as represented to him when obtaining the loan.
10 At best, Macklin asserts that he should have the right to know how
11 and direct how the lender intends to use those monies paid by him
12 on the loan.

13 Macklin further contends that "Defendants" fraudulently
14 misrepresented "its standing" to foreclose on Macklin's note and
15 deed of trust to the State of California by falsely reporting a
16 default on the loan to the Recorder's Office. Macklin states that
17 Defendants made these representations with full knowledge that
18 their representations were false as further evidenced by
19 Defendant's production of two separate allonges to the Note, which
20 derive from the same lender. Macklin asserts that because he was
21 not an investment banker, securities dealer, mortgage lender or
22 broker - (or, in other words, that he was unsophisticated with
23 regards to financial matters) - he reasonably relied upon the
24 misrepresentations made by "Defendants" when he agreed to execute
25 the loan documents. According to Macklin, as a direct and
26 proximate cause of "Defendants'" false representations and material
27 omissions, his credit was ruined and he has either lost or is about
28 to lose his home.

1 Under California law, the elements of fraud are a
2 "misrepresentation, knowledge of its falsity, intent to defraud,
3 justifiable reliance, and resulting damages."⁷⁶ Under Federal Rule
4 of Civil Procedure 9(b), as made applicable to this adversary
5 proceeding by Federal Rule of Bankruptcy Procedure 7009, fraud must
6 be pled "with a high degree of meticulousness."⁷⁷ In fraud cases,
7 "the who, what, when, where and how" of the misconduct must be
8 alleged so as to give defendants sufficient information to defend
9 the charge against them.⁷⁸

10 Rule 9(b) prevents a complaint from merely lumping multiple
11 defendants together; "plaintiffs [must] differentiate their
12 allegations when suing more than one defendant . . . and inform
13 each defendant separately of the allegations surrounding his
14 alleged participation in the fraud."⁷⁹ "Rule 9(b) serves three
15 purposes: (1) to provide defendants with adequate notice to allow
16 them to defend the charge and deter plaintiffs from the filing of
17 complaints 'as a pretext for the discovery of unknown wrongs';
18 (2) to protect those whose reputation would be harmed as a result
19 of being subject to fraud charges; and (3) to "prohibit []
20 plaintiff[s] from unilaterally imposing upon the court, the parties
21 and society enormous social and economic costs absent some factual
22

23 ⁷⁶ *Gil v. Bank of America, N.A.* 138 Cal. App. 4th 1371, 1381
24 (2006).

25 ⁷⁷ *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir.
26 2000); *Moore v. Brewster*, 96 F.3d 1240, 1245-46 (9th Cir. 1996).

27 ⁷⁸ *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).

28 ⁷⁹ *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007)
(citation and quotation omitted) (second alteration supplied).

1 basis.'"⁸⁰

2 As stated in *Nymark v. Heart Fed. Savings & Loan Assn.*:⁸¹

3 [The court has found no] California case specifically
 4 addressing whether a lender has a duty of care to a
 5 borrower in appraising the borrower's collateral to
 6 determine if it is adequate security for a loan.
 7 However, as a general rule, a financial institution owes
 8 no duty of care to a borrower when the institution's
 9 involvement in the loan transaction does not exceed the
 10 scope of its conventional role as a mere lender of money.
 11 (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 34-35 [161
 12 Cal.Rptr. 516]; *Fox & Carskadon Financial Corp. v. San*
 13 *Francisco Fed. Sav. & Loan Assn.* (1975) 52 Cal.App.3d
 14 484, 488, 489 [125 Cal.Rptr. 549]; *Bradler v. Craig*
 15 (1969) 274 Cal.App.2d 466, 473, 476 [79 Cal.Rptr. 401].)
 16 Thus, for example, a lender has no duty to disclose its
 17 knowledge that the borrower's intended use of the loan
 18 proceeds represents an unsafe investment. (*Wagner v.*
 19 *Benson, supra*, 101 Cal.App.3d at pp. 33-35.) 'The
 20 success of the [borrower's] investment is not a benefit
 21 of the loan agreement which the [lender] is under a duty
 22 to protect [citation].' (*Id.*, at p. 34.) 'Liability to
 23 a borrower for negligence arises only when the lender
 24 "actively participates" in the financed enterprise
 25 "beyond the domain of the usual money lender."' (*Id.*, at
 26 p. 35; quoting *Connor v. Great Western Sav. & Loan Assn.*
 27 (1968) 69 Cal.2d 850, 864 [73 Cal.Rptr. 369, 447 P.2d
 28 609, 39 A.L.R.3d 224].)

17 With respect to the alleged misrepresentations, Macklin does
 18 not allege that he did not receive what was represented to him at
 19 the time of the loan transaction. He sought, and obtained, monies
 20 on the terms he negotiated. All of the alleged misrepresentations
 21 occurred after he obtained the monies and given the note and deed
 22 of trust. There are no allegations of any reasonable reliance on

24 ⁸⁰ *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.
 25 Cal. 2009) (quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
 26 1405 (9th Cir. 1996) (quoting *Semegen v. Weidner*, 780 F.2d 727,
 731 (9th Cir. 1985)) (internal quotations omitted, brackets in
 original)).

27 ⁸¹ 231 Cal. App. 3d 1089, 1095-96 (1991); see also *Cross v.*
 28 *Downey S&L Ass'n*, 2009 U.S. Dist. LEXIS 17946, *12-13 (C.D. Cal.
 Feb. 23, 2009).

1 the alleged misrepresentations to Macklin's detriment. He disputes
2 DBNTC's interest in the Property and contends that
3 misrepresentations were made to the County when DBNTC and its
4 representatives proceeded with the steps necessary to notice and
5 conduct a nonjudicial foreclosure sale. At least two of the
6 necessary elements of fraud are missing – justifiable reliance on
7 the alleged misrepresentation and damages arising from reliance on
8 the alleged misrepresentation.

9 Accordingly, the Motion to Dismiss is granted as to the Fourth
10 Cause of Action without leave to amend.

11 **UNJUST ENRICHMENT – FIFTH CAUSE OF ACTION**

12 Macklin asserts in his Fifth Cause of Action that Defendant
13 DBNTC should have disclosed to him whatever fees were not applied
14 to the payment of the loan. Macklin alleges that Defendant
15 retained the benefits of charging a higher interest rate, rebates,
16 kickbacks, and profits (from the resale of mortgages and notes
17 using Macklin's identity, credit score, and reputation without
18 consent, and as part of an illegal scheme). As a result,
19 Defendants have been unjustly enriched at the expense of Plaintiff
20 Macklin. What Macklin does not allege or explain is what "fees"
21 are charged as a loan transaction which are applied to pay the loan
22 (principal and interest). By their very nature, fees are owed in
23 addition to the principal and interest.

24 According to *First Nationwide Savings v. Perry*:⁸²

25 An individual is required to make restitution if he or
26 she is unjustly enriched at the expense of another.
27 (Rest., Restitution, § 1; *California Federal Bank v.*
Matreyek (1992) 8 Cal.App.4th 125, 131 [10 Cal.Rptr.2d

28 ⁸² 11 Cal.App.4th 1657, 1662 (Cal. App. 6th Dist. 1992)

1 58].) A person is enriched if the person receives a
2 benefit at another's expense. (Rest., Restitution, supra,
3 \$ 1, com. a.) Benefit means any type of advantage.
(Rest., supra, \$ 1, com. b; *California Federal Bank v.*
4 *Matreyek*, supra, 8 Cal.App.4th at p. 131.)

5 However, "it is of course the law that when one obtains a
6 benefit which may not be justly retained, unjust enrichment
7 results, and restitution is in order."⁸³ "However, the 'mere fact
8 that a person benefits another is not of itself sufficient to
9 require the other to make restitution therefor.'"⁸⁴

10 DBNTC asserts that Macklin received the benefit of the
11 bargain. He borrowed money to purchase a home. Although Macklin
12 alleges that he received less than what he paid for because
13 defendant extracted fees, he does not assert that he suffered an
14 actual injury.

15 DBNTC asserts that as to a claim for unjust enrichment
16 resulting in an implied-in-fact contract, "it is well settled that
17 an action based on an implied-in-fact or quasi-contract cannot lie
18 where there exists between the parties a valid express contract
19 covering the same subject matter."⁸⁵ Here, there is a valid loan
20 agreement (express contract) between Macklin and Defendant.

21 Accordingly, the Motion to Dismiss is granted as to the Fifth
22 Cause of Action for unjust enrichment without leave to amend.
23
24

25 ⁸³ *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 181
26 Cal. App. 3d 122, 134 (1986) (citations omitted).

27 ⁸⁴ *Id.* (citation omitted).

28 ⁸⁵ *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal.
App. 4th 194, 203 (1996).

**RACKETEER INFLUENCED AND CORRUPT
ORGANIZATIONS ACT ("RICO")- SIXTH CAUSE OF ACTION**

Macklin's Sixth Cause of Action alleges violations of RICO arising under 18 U.S.C. §§ 1961-1968. Through his FAC, Macklin alleges that nonspecific "Defendants" used multiple corporate entities and parties to perpetrate a fraud against Macklin through the use of intentional nondisclosure, fraud, and the creation of fraudulent loan documents. As to DBNTC, Macklin asserts Defendant recorded fraudulent or false documents with the Placer County Recorder Officer in an attempt to take the Property. The specific acts at issue are the alleged use of false signatures on recorded documents which are alleged to violate federal mortgage lending laws, banking regulations, consumer credit laws, and various California state laws concerning conveyance of notes and deeds of trust.

According to 18 U.S.C. § 1962(c), "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in or the activities of which effect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." According to *Flores v. Emerich & Fike*:⁸⁶

Section 1961 enumerates acts which are considered to be 'racketeering activity' (i.e., 'predicate acts'). Included is 'any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in Section 102 of the Controlled Substances Act), which is chargeable under State Law and punishable by imprisonment for more

⁸⁶ 416 F. Supp. 2d 885, 911 (E.D. Cal. 2006)

1 than one year.' § 1961(1)(A). Also included are any of
2 more than twenty types of conduct indictable under
3 enumerated provisions of the United States Code, ranging
4 from mail fraud and wire fraud, through robbery and
5 extortion, to white slave trade. § 1961(1)(B). Finally,
6 a 'predicate act' may also be established by any offense
involving fraud 'connected with' a bankruptcy case,
'fraud in the sale of securities,' or any act related to
a controlled substance or listed chemical "punishable"
under federal law.' § 1961(1)(C).

7 A civil RICO complaint must at least allege: "(1) conduct
8 (2) of an enterprise (3) through a pattern (4) of racketeering
9 activity (known as 'predicate acts') (5) causing injury to
10 plaintiff's business or property.'" ⁸⁷ As a threshold matter,
11 Federal Rule of Civil Procedure 9(b) applies to RICO Fraud
12 allegations, including Mail Fraud and Wire Fraud. ⁸⁸ "Rule 9(b)
13 requires that the pleader state the 'time, place, and specific
14 content of the false representations, as well as the identities of
15 the parties to the misrepresentation.'" ⁸⁹

16 Here, Macklin has failed to allege a cause of action pursuant
17 to RICO with the required specificity. Macklin asserts that "[a]t
18 various times and places[,]" nonspecific "defendants" did acquire
19 and maintain an interest in or control of a RICO enterprise of
20 individuals who were associated, and who engaged in some type of
21 interstate commerce in violation of RICO. ⁹⁰ Macklin alleges that
22 the notarizations on the Notice of Default and Notice of Trustee's
23

24 ⁸⁷ Flores, F. Supp. 2d at 911 (quoting *Living Designs, Inc. v.*
25 *E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005)).

26 ⁸⁸ *Id.* (citing *Moore v. Kayport Package Express, Inc.*, 885 F.2d
531, 541 (9th Cir. 1989))

27 ⁸⁹ *Id.*

28 ⁹⁰ FAC ¶ 103.

1 Sale were not notarized properly under penalty of perjury, or were
2 falsely attested to by someone.⁹¹ Macklin alleges that during the
3 "pertinent" time, Defendant participated in the commission of two
4 or more of the RICO predicate acts. According to Macklin, it is
5 alleged that DBNTC or its agents used false signatures of what are
6 commonly known as "robo-signers." Macklin asserts that as a result
7 of the Defendant's actions, he continues to suffer unspecified
8 damages.

9 The RICO claim does not attribute specific conduct to
10 individual defendants. The claim also does not specify either the
11 time or the place of the alleged wrongful conduct, except to state
12 that "[a]t all relevant times, Defendants have engaged in a
13 conspiracy, common enterprise, and common course of conduct, the
14 purpose of which is to engage in the violations of law alleged in
15 the complaint."⁹² This is insufficient. "[The Ninth Circuit has]
16 interpreted Rule 9(b) to mean that the pleader must state the time,
17 place, and specific content of the false representations as well as
18 the identities of the parties to the misrepresentation."⁹³

19 Because Macklin has failed to allege a civil RICO cause of
20 action with the required specificity, the Motion to Dismiss is
21

22 ⁹¹ *Id.*

23 ⁹² *Id.* at ¶ 111.

24 ⁹³ *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d
25 1393, 1401 (9th Cir. Cal. 1986) (citing *Semegen v. Weidner*, 780 F.2d
26 727, 731 (9th Cir. 1985) (citing *Miscellaneous Service Workers,*
27 *Drivers & Helpers v. Philco-Ford Corp.*, 661 F.2d 776, 782 & n.16 (9th
28 Cir. 1981)); *Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602, 611
(9th Cir. 1977); see also *Lewis v. Sporck*, 612 F. Supp. 1316, 1325
(N.D. Cal. 1985) (allegations of mail fraud under section[s]
1962(a)-1962(c) "must identify the time, place, and manner of each
fraud plus the role of each defendant in each scheme").

1 granted as the Sixth Cause of Action, without leave to amend.

2 **UNFAIR COMPETITION LAW (CAL. BUS. & PROF. CODE § 17200)**
3 **- SEVENTH CAUSE OF ACTION**

4 Macklin's Seventh Cause of Action, pursuant to California's
5 Unfair Competition Law, assert that the foreclosing defendants
6 engage in deceptive business practices with respect to mortgage
7 loan servicing, assignments of notes and deeds of trust, and
8 foreclosure of residential properties and related matters in a
9 number of ways.⁹⁴ Macklin states that the foreclosing defendants
10 engage in an uniform pattern and practice of overly-aggressive
11 servicing that results in unfair and illegal foreclosure
12 proceedings, generating unfair fees to California consumers and
13 premature default.⁹⁵ Macklin asserts that the defendants have been
14 unjustly enriched and should be enjoined from continuing in such
15 practices pursuant to California Business & Professions Code
16 §§ 17203 and 17204.⁹⁶ Macklin also asserts that he is entitled to
17 injunctive relief and attorney's fees for defendant's violation of
18 this Code Section.

19 In order to state a claim upon which relief may be granted, a
20 claim under California's Unfair Competition Law⁹⁷ (the "UCL") a
21 plaintiff must allege that the defendant committed a business act
22 that is either fraudulent, unlawful or unfair.⁹⁸ A business act

23 ⁹⁴ FAC ¶ 117.

24 ⁹⁵ *Id.* at ¶ 119.

25 ⁹⁶ *Id.* at ¶ 122.

26 ⁹⁷ Cal. Bus. & Prof. Code § 17200, et seq.

27 ⁹⁸ *Levine v. Blue Shield of California*, 189 Cal.App.4th 1117,
28 1136 (2010).

1 need only meet one of the three criteria - unlawful, unfair, or
2 fraudulent, to be considered unfair competition under the UCL. In
3 order for a business act to be considered "unlawful" there must be
4 some underlying violation of a law.⁹⁹

5 A "fraudulent" business act, for the purposes of the UCL, is
6 unlike common law fraud or deception. A violation can be shown
7 even if no one was actually deceived, relied upon the fraudulent
8 practice, or sustained any damage. Instead, it is only necessary
9 to show that members of the public are likely to be deceived.¹⁰⁰

10 "Unfairness" under the UCL is an equitable concept that
11 involves an examination of the impact of the business practice on
12 the alleged victim, balanced against the reasons, justifications
13 and motives of the alleged wrongdoer in order to weigh the utility
14 of the defendant's conduct against the gravity of the harm to the
15 alleged victim. For the purposes of a motion to dismiss, in order
16 to state a claim for relief resulting from an allegedly unfair
17 business practice under the UCL, the complaint must state "a *prima*
18 *facie* case of harm, having its genesis in an apparently unfair
19 business practice."¹⁰¹ The complained of practice must be tethered
20 to a legislatively-declared policy.¹⁰²

21 In this case, the seventh claim for relief is dismissed
22 because it does not state a claim under any of the three prongs of

23 ⁹⁹ See *Cisneros v. Instant Capital Funding Group*, 263 F.R.D. 595,
24 610 (E.D. Cal. 2009).

25 ¹⁰⁰ *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167 (2000).

26 ¹⁰¹ *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 740
27 (1980); see also *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167.

28 ¹⁰² *Lozano v. AT&T Wireless Servs., Inc.*, 405 F.3d 718, 736 (9th
Cir. 2007).

1 the UCL. As to the "unlawful" prong, the Complaint does not allege
2 the violation of any other law that would serve as an underlying
3 violation for the UCL. As to the "unfair" prong, the Complaint
4 does not allege any legislatively-declared policy to which
5 allegedly wrongful conduct may be tethered.

6 Accordingly, the Motion to Dismiss is granted as to the
7 Seventh Cause of Action, without leave to amend.

8 **BREACH OF TRUST INSTRUMENT - EIGHT CAUSE OF ACTION**

9 In the Eighth and Ninth Causes of Action, Macklin asserts that
10 the Deed of Trust is the document which permits a nonjudicial
11 foreclosure sale to proceed and gives Power of Sale to the duly
12 appointed Trustee.¹⁰³ According to Macklin, only the Lender can
13 invoke the foreclosure, and may appoint a Trustee. Macklin alleges
14 that the substitution of Trustee in this case is void due to fraud,
15 and was not executed in compliance with California Civil Code
16 § 2934(a). Macklin further argues that the substitution of Trustee
17 was invalid because it was not executed by the lender. As of the
18 recording of the Notice of Default on December 8, 2008, the duly
19 appointed Trustee was Financial Title Company. Quality Loan was
20 substituted as Trustee on November 25, 2009. Macklin asserts that
21 the Notice of Default was obtained prior to the assignment, but the
22 California Civil Code requires that a trustee under a deed of trust
23 property be appointed prior to commencing the nonjudicial
24 foreclosure. Macklin asserts that in the case of a deed of trust
25 with a power of sale, an assignee can only enforce the power of
26 sale if the assignment is recorded, since the assignee's authority

27
28 ¹⁰³ FAC ¶ 123.

1 to conduct the sale must appear in the public records. According
2 to Macklin, a nonjudicial foreclosure sale under the power of sale
3 in a deed of trust or mortgage must be conducted in strict
4 compliance with its provisions and applicable statutory law.

5 Macklin asserts that the notice of acceleration and notice to
6 cure are conditions precedent to nonjudicial foreclosure of the
7 power of sale.¹⁰⁴ Macklin further asserts that if the lender fails
8 to carry out the foregoing obligation, any subsequent foreclosure
9 sale is invalid. Macklin alleges that the Defendant has trespassed
10 "upon the Deed of Trust and Plaintiff's property," and the
11 foreclosure sale must be rendered void and rescinded pursuant to
12 California Civil Code § 3513. Macklin contends that because the
13 law was established for public reason, it cannot be contravened by
14 a private agreement pursuant to California Civil Code § 3514.

15 In support of his claim for breach of the trust instrument,
16 Macklin alleges that Quality Loan Service Corp. ("QLS") filed the
17 Notice of Default before it was substituted as trustee.¹⁰⁵ However,
18 Windsor Management Co. recorded the default "[a]s agent for the
19 current beneficiary,"¹⁰⁶ arguably rendering the notice proper under
20 California Civil Code § 2924(a)(1), which authorizes the
21 beneficiary, trustee, or their agents to record the Notice of
22 Default.

23 Macklin also alleges that Defendant breached the trust
24

25 ¹⁰⁴ *Id.* at ¶ 124.

26 ¹⁰⁵ The Substitution of Trustee by DBNTC recorded on November 29,
27 2009, purporting to substitute Quality Loan Service Corp for Windsor
Management Co. as trustee under the Deed of Trust, states that it was
signed by DBNTC on August 21, 2009.

28 ¹⁰⁶ Dckt. 154 at 23.

1 instrument by failing to follow the provisions regarding notice of
2 acceleration and notice to cure. The Notice of Default, however,
3 clearly states that Macklin could bring his account into good
4 standing by paying the past-due amounts no later than five days
5 before the foreclosure sale. The Deed of Trust contained an
6 acceleration clause, and the Notice of Default was therefore
7 allowed to contain a notice of acceleration.

8 Because the text of the Notice of Default contradicts
9 Macklin's claim that Defendant did not to inform him of the
10 possibility of acceleration and his right to cure, the Motion is
11 granted and the Eighth Cause of Action is dismissed, without leave
12 to amend.

13 **WRONGFUL FORECLOSURE- NINTH CAUSE OF ACTION**

14 In the Ninth Cause of Action Macklin asserts that the
15 foreclosure sale was improper. This focuses on whether the
16 Defendant has complied with California law for conducting a
17 nonjudicial foreclosure sale. The court throughly addressed the
18 issue of the filing of the notice of default prior to the filing of
19 the notice of assignment in connection with issuing the preliminary
20 injunction. The court's view on the issue has not changed.¹⁰⁷ The
21 Assignment of the Deed of Trust was recorded on November 30, 2009.
22 However, the Substitution of Trustee by DBNTC recorded on
23 November 29, 2009, purporting to substitute Quality Loan Service
24 Corp. for Windsor Management Co. as trustee under the Deed of
25 Trust.

26 Civil Code § 2932.5 provides that, where a power of sale for
27

28 ¹⁰⁷ Memo. Opinion & Decision, Dckt. 98.

1 real property is given to a mortgagee or other encumbrancer to
2 secure an obligation, such power of sale may be exercised by the
3 assignee who is entitled to receive payment of the obligation "if
4 the assignment is duly acknowledged and recorded." If the
5 assignment has not been recorded, then the power cannot be
6 exercised. The application of Civil Code § 2932.5 to all
7 encumbrances, including deeds of trust, works to protect the
8 borrower (trustor), lender (beneficiary), trustee, purchaser at a
9 foreclosure sale, and subsequent owners of the property. Before
10 persons purport to take action and exercise rights under a Deed of
11 Trust, the assignment documenting the acquisition of those rights
12 is recorded with the county recorder. This results in the real
13 property records clearly and unambiguously stating who held the
14 rights and who asserted the rights. This minimizes title disputes
15 years later as to whether a notice of default or notice of sale was
16 given by a properly authorized party and whether the purported sale
17 under the Deed of Trust is void. This imposes a minimal burden on
18 the beneficiary acquiring a Note secured by a Deed of Trust –
19 merely recording the notice of assignment before purporting to
20 change the trustee or authorize a foreclosure.

21 In the present case, Macklin and DBNTC have demonstrated that
22 the recording of the assignment of the Deed of Trust postdated
23 DBNTC recording documents purporting to change the trustee to
24 Windsor Management and then Windsor Management purporting to give
25 a notice of sale. While DBNTC missed its obligation to record the
26 assignment of the trust deed by a few days, a record has been
27 created that someone not of record title purported to take action
28 on a Deed of Trust prior to compliance with Civil Code § 2932.5.

1 The court will not sanction conduct by this Defendant which
2 puts into question the validity of the nonjudicial foreclosure
3 process and California real property records. Though this issue
4 could have been simply addressed by the recording of a new notice
5 of default months ago, the ninety days under the new notice of
6 default allowed to run and this creditor be on the door step of
7 conducting a nonjudicial foreclosure sale consistent with the
8 California statutes, it has elected to continue with the existing
9 notice of default, subsequent substitution of trustee, and sale.¹⁰⁸

10 While titled as "wrongful foreclosure," this cause of action
11 reads in substance as a breach of contract action. The contract
12 between the parties is the Note and Deed of Trust. Macklin has
13 certain obligations and rights under these contracts and law
14 applicable to the contract, and DBNTC as the current owner of the
15 Note and beneficiary under the Deed of Trust has certain rights and
16 obligations in connection with exercising those rights. Macklin
17 contends that DBNTC has not met its obligations in connection with
18 exercising those rights and has improperly asserted that it
19 acquired title to the Property. This has necessitated Macklin
20 bringing this action and seeking to quiet title as between their

21
22 ¹⁰⁸ The Chinese proverb that the best time to plant a tree was
23 20 years ago, and the next best time is now, provides guidance in
24 compliance with statutory schemes. To the extent that an error
25 occurred in the handling of the substitution of trustee (having not
26 done it correctly in the past), the time to correct it is now. This
27 avoids future lawsuits and significant costs and expenses if a dispute
28 based on noncompliance with the statute is raised later. Examples of
not taking a proactive approach to correcting defects include the Ford
Motor Company decision in the 1970's not to replace an inexpensive
bolt on the fuel tank mount for the Ford Pinto, instead electing to
pay for the deaths and disfiguring injuries resulting from the gas
tank exploding when the Pinto was involved in minor rear-end
collisions. See *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757
(1981).

1 competing claims.

2 The Motion to dismiss the Ninth Cause of Cause of Action for
3 wrongful foreclosure is denied.

4 **QUIET TITLE - TENTH CAUSE OF ACTION**

5 The Tenth Cause of Action seeks to quiet title in the
6 Property. Macklin argues that he holds superior title to the
7 Property than DBNTC. DBNTC seeks to dismiss this cause of action,
8 arguing that the cause of action fails to properly plead the
9 elements of quiet title.

10 According to *Matracia v. JP Morgan Chase Bank, NA*,¹⁰⁹ "[t]he
11 purpose of a quiet title action is to establish one's title against
12 adverse claims to real property. A basic requirement of an action
13 to quiet title is an allegation that plaintiffs 'are the rightful
14 owners of the property, i.e.,[] that they have satisfied their
15 obligations under the Deed of Trust.'" ¹¹⁰ California Code of Civil
16 Procedure § 761.020 states that a claim to quiet title requires:
17 (1) a verified complaint, (2) a description of the property,
18 (3) the title for which a determination is sought, (4) the adverse
19 claims to the title against which a determination is sought,
20 (5) the date as of which the determination is sought, and (6) a
21 prayer for the determination of the title.

22 Though not artfully done, Macklin sufficiently explains that
23 he asserts a superior title to the Property over the Trustee's Deed
24 through which DBNTC asserts its interest in the Property. Given
25

26 ¹⁰⁹ No. _____, 2011 U.S. Dist. LEXIS 84066, *15 (E.D. Cal.
27 July 29, 2011).

28 ¹¹⁰ *Kelley v. Mortg. Elec. Registration Sys., Inc.*, 642 F. Supp.
2d 1048, 1057 (N.D. Cal. 2009).

1 that Macklin has asserted that DBNTC cannot show that it complied
2 with the minimal requirements for properly conducting a nonjudicial
3 foreclosure sale, the motion to dismiss the Tenth Cause of Action
4 to Quiet Title is denied.

5 Accordingly, the Motion to Dismiss is denied as to the Tenth
6 Cause of Action.

7 **DISCRETIONARY ABSTENTION**

8 Pursuant to 28 U.S.C. § 1334(c)(1), this court may abstain
9 from any matter arising under, arising in, or related to the case
10 under Title 11 in the interests of justice, comity with state
11 courts, or respect for state law. In this case the Chapter 7
12 Trustee has "sold" the estate's interest in the Property for a
13 contingent future recovery if Macklin succeeds in this case.
14 Macklin is asserting, enforcing, and attempting to recover for the
15 benefit of creditors the Estate's interest in the Property.

16 Though Macklin is not attempting to prosecute a Chapter 11 or
17 Chapter 13 reorganization which incorporates this adversary
18 proceeding, the Estate has a continuing economic interest in the
19 litigation. Further, through this motion to dismiss the parties
20 and court have substantially focused the issues to those of
21 substance. For the court to abstain at this point would throw out
22 all of the time and money invested by the parties, in addition to
23 significant judicial resources, in coming to this point in the
24 litigation.

25 The court concludes that discretionary abstention is not
26 appropriate in this case.

27 **CONTENTIONS OF INABILITY TO SUFFICIENTLY RESPOND**

28 While this matter was under submission, Macklin filed a motion

1 for further argument on this Motion to Dismiss, arguing that he
2 recently substituted the Law Offices of Allan R. Frumkin, Inc. as
3 his counsel of record in this case. It is not alleged that there
4 is any additional law or authorities which Macklin intends to
5 present to the court. Macklin has been represented by counsel,
6 with his arguments and theories effectively presented, since the
7 commencement of this Adversary Proceeding 12 months ago, as well as
8 in the Chapter 7 case itself filed on September 16, 2010.

9 Two declarations were filed in support of the motion. The
10 first is by Mr. Frumkin, Macklin's new counsel in this Adversary
11 Proceeding. The substance of Mr. Frumkin's testimony is that after
12 reviewing the court's tentative ruling, he concludes that the First
13 Amended Complaint did not contain necessary allegations to
14 withstand the motion to dismiss. He believes that unspecified
15 additional allegations could be made, however, he does not state,
16 nor does the motion allege, any such allegations. This declaration
17 leaves it to the court to either divine the additional allegations
18 which may exist or blindly accept that such allegations will not be
19 made in the case after two motions to dismiss.

20 Macklin has also provided his declaration in support of the
21 motion for further argument. He first testifies that when he went
22 to sign the original loan application, he was not allowed to review
23 the application because the notary had to leave. Macklin offers no
24 explanation why a loan application was being notarized – something
25 which is not common in California loan transactions. Macklin
26 testifies that he instead relied on his loan broker's
27 representations that the application reflected the information in
28 Macklin's tax returns. He further testifies that only later did he

1 discover that the information in the loan application that he was
2 "pressured" into signing did not contain accurate information.
3 Macklin offers no testimony as to why and how he was "pressured"
4 into signing a loan application. He merely states that the notary
5 had to leave.

6 Macklin further testifies that in June 2011, he contacted his
7 former attorney regarding the status of the First Amended Complaint
8 and was told that it was not ready for review. Then, on June 17,
9 2011, he was contacted by his former counsel to come to her office
10 and verify the First Amended Complaint. Once again, he was
11 "forced" to sign a document without reviewing it because it had to
12 be filed immediately. As with the loan application, Macklin states
13 that he was not provided adequate time to review the document
14 before signing it.¹¹¹ Macklin states that he subsequently reviewed
15 the complaint and drew the legal conclusion that many of the causes
16 of action had not been adequately pled, but was told by his former
17 counsel that it was too late to file a corrected First Amended
18 Complaint.¹¹² Macklin further states that he tried at the hearing

19
20 ¹¹¹ Notwithstanding this declaration having been prepared with
21 the assistance of his present counsel and clearly stating under
22 penalty of perjury that "I signed the verification," the First Amended
23 Complaint does not contain any verification. Dckt. 120. A
24 verification, dated June 17, 2011, is separately filed on June 21,
2011. Dckt. 132. Attached to the First Amended Complaint are a
series of exhibits, Dckts. 121-129. The Complaint, with exhibits
attached, runs 606 pages (46 of which constitute the unverified First
Amended Complaint).

25 ¹¹² In finding that the FAC did not adequately plead claims, and
26 as is continued through the exhibit of what would be a second amended
27 complaint, Macklin and his counsel continue the "more is better" theme
28 of pleading. The FAC is 46 pages in length and has over 200 pages of
exhibits. The second amended complaint is 45 pages in length, and
continues the using dense text in attempting to communicate the
grounds upon which the relief is based, including single paragraphs

1 on the Motion to Dismiss the First Amended Complaint to instruct
2 his prior counsel of the issues and corrections, "but she did not
3 appropriately or persuasively address them in open court."¹¹³

4 Macklin and his new counsel filed a document titled Second
5 Amended Complaint without obtaining leave from the court.¹¹⁴ The
6 court deemed this to be an exhibit to the motion for further
7 argument, rather than Macklin intentionally filing pleadings which
8 do not comport with the Federal Rules of Civil Procedure and prior
9 orders of this court.¹¹⁵

10 The Second Amended Complaint filed as an exhibit states
11 conclusions that New York Trust law controls over California Real
12 Property law, that the Note and Deed of Trust have been rendered
13 unenforceable, that because the transfer of the Note to a trust as
14 part of a securitized loan portfolio may not have complied with the
15 Internal Revenue Code no obligation is enforceable against Macklin,
16 MERS is named as the nominee of the lender and the Deed of Trust is
17 ineffective, Macklin's loan was funded with monies obtained other
18 than the Lender named in the Note, the Note has been separated from
19 the Deed of Trust, and that the Note and Deed of trust have been
20 forfeited, rendered unenforceable, and a nullity. Therefore, for
21 these various grounds, Macklin owns the Property free and clear of
22

23 running more than a page in length. Rather than alleging the basis
24 for a claim, the FAC is written more as an editorial and argumentative
25 treatise in support of Macklin's contention that he owns the Property
and has no obligation to pay for the monies he received as part of the
loan transaction.

26 ¹¹³ Dckt. 200.

27 ¹¹⁴ Dckt. 201.

28 ¹¹⁵ Dckt. 213.

1 any lien, has no obligation to repay the money he borrowed, and
2 DBNTC is obligated to pay him damages.

3 In opposing the motion to dismiss, the motion for a temporary
4 restraining order, the motion for preliminary injunction (which was
5 granted and then dissolved when Macklin did not comply with the
6 minimal conditions imposed by the court for creating a cash bond
7 funded through a monthly payment which approximated a monthly loan
8 payment), and proceedings in the Chapter 7 case, Macklin has not
9 provided the legal authority for the underlying proposition that
10 the Note (personal property) and Deed of Trust (interest in real
11 property) have been destroyed, forfeited, or otherwise been
12 rendered null and void.

13 If Macklin and his counsel intend to file a motion for leave
14 to file a second amended complaint, such motion shall be
15 accompanied by a points and authorities providing the legal basis
16 underlying an allegation, as well as the proposed amended complaint
17 being filed as an exhibit. In this Adversary Proceeding Macklin
18 has been afforded the opportunity to file two Complaints (Original
19 and FAC) and put DBNTC to the test of initiating motions to dismiss
20 to challenge the legal sufficiency of the allegations and law
21 underlying the allegations. Such is the privilege of a plaintiff
22 for the original complaint and first amended complaint. However,
23 the complaint amendment process is not one in which repeated,
24 unsupported contentions are made with impunity. It is not too much
25 for any second or further amended complaint to be allowed only
26 after counsel and Macklin have shown that they have engaged in at
27 least the minimal legal research and base the claims on actual
28 existing legal authorities and principles, or the good faith

1 extension or reversal of existing authorities.

2 In considering seeking leave to file a further amended
3 complaint, and in addition to providing the legal authorities which
4 are identified to support their good faith contentions, Macklin and
5 his counsel should preemptively address established California law
6 that the deed of trust always follows the note;¹¹⁶ the California
7 Commercial Code (negotiation, enforceability, and enforcement of
8 notes); forfeiture of property rights not favored; how payments
9 made by insurance companies; loan servicers or others pursuant to
10 agreement not including Macklin provide for the payment of
11 Macklin's obligations under the Note and the principles of
12 subrogation do not apply; and the holding of the Ninth Circuit
13 Court of Appeals in *Cervantes v. Countrywide Home Loans, Inc.*¹¹⁷

14 Finally, if Macklin and his counsel intend to seek leave to
15 file a second amended complaint, rather than merely patching the
16 bloated FAC, they would be well served to draft a complaint which
17 clearly states the relevant alleged grounds upon which each cause
18 of action is based. While the practice of each cause of action
19 indiscriminately incorporating all of the prior paragraphs of the
20 complaint by reference may be easier, it does not lead to the court
21 and other parties being able to clearly understand the "short and
22 plaint statement of the claim showing that the pleader is entitled
23 to relief" as required by Federal Rule of Civil Procedure 8(a)(2)
24 and Federal Rule of Bankruptcy Procedure 7008. The court and
25

26 ¹¹⁶ *Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo*
27 *Land Co.*, 216 Cal. 165, 170 (1932); *Adler v. Sargent*, 109 Cal. 42,
49-50 (1895); Cal. Civ. Code § 2936.

28 ¹¹⁷ 650 F.3d 1034 (9th Cir. 2011).

1 opposing parties should be able to step through each allegation and
2 understand the factual basis for each claim, rather than being
3 presented with an argumentative treatise and re-regurgitated
4 allegations which may or may not be relevant to the identified
5 claim.

6 **CONCLUSION**

7 The court grants the motion to dismiss, without leave to amend
8 for the first (Truth in Lending Act), second (Real Estate
9 Settlement Procedures Act), third (Fair Credit Reporting Act),
10 fourth (Fraud), fifth (Unjust Enrichment), sixth (Civil RICO),
11 seventh (Business and Professions Code § 17200), and eighth (Breach
12 of Security Agreement) causes of action.

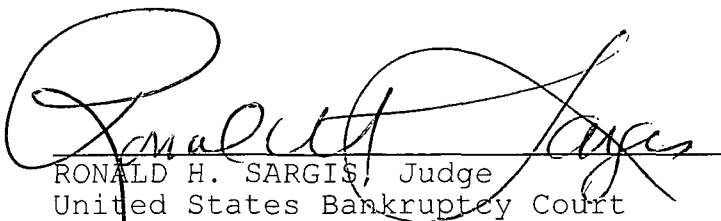
13 The motion is denied as to the ninth cause of action (Wrongful
14 Foreclosure) and tenth cause of action (Quiet Title).

15 DBNTC shall file and serve its answer on or before
16 **February 28, 2012.**

17 This Memorandum Opinion and Decision constitutes the court's
18 findings of fact and conclusions of law pursuant to Federal Rules
19 of Civil Procedure 7052 and Federal Bankruptcy Rules of
20 Procedure 7052.

21 The court shall issue a separate order consistent with this
22 Memorandum Opinion and Decision.

23 Dated: February 16, 2012

24
25 
26 RONALD H. SARGIS, Judge
27 United States Bankruptcy Court
28

This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

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